

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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IN RE: NATIONAL PRESCRIPTION : *Case No. 1:17-md-2804*
OPIATE LITIGATION : *Cleveland, Ohio*

THIS DOCUMENT RELATES TO: : *Wednesday,*
: *December 2, 2020*
All Cases : *1:02 p.m.*

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TRANSCRIPT OF TELEPHONIC STATUS CONFERENCE PROCEEDINGS

BEFORE THE HONORABLE DAN AARON POLSTER

UNITED STATES DISTRICT JUDGE

- AND -

BEFORE THE HONORABLE DAVID A. RUIZ

UNITED STATES MAGISTRATE JUDGE

SPECIAL MASTER: DAVID R. COHEN

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1 AFTERNOON SESSION, WEDNESDAY, DECEMBER 2, 2020

2 (Proceedings commenced at 1:02 p.m.)

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4 JUDICIAL ASSISTANT NORTON: I'm just going to
5 start shouting out names.

6 Do I have Joe Rice?

7 How about Paul Hanly?

8 Paul Farrell?

9 Pete Weinberger?

12:57:57 10 MR. WEINBERGER: Yes, I'm on. Thank you.

11 JUDICIAL ASSISTANT NORTON: Thank you.

12 Steve Skikos, are you on?

13 Troy Rafferty?

14 MR. WEINBERGER: Troy is not going to be on
12:58:31 15 the call.

16 JUDICIAL ASSISTANT NORTON: Okay.

17 Then I'm going to start with CVS.

18 How about Eric Delinsky?

19 MR. DELINSKY: I'm here. Thanks.

12:58:42 20 JUDICIAL ASSISTANT NORTON: Perfect.

21 Sasha Miller?

22 MS. MILLER: Yes, I'm here.

23 JUDICIAL ASSISTANT NORTON: Graeme Bush?

24 MR. BUSH: Yes, I'm on. Thank you.

12:58:55 25 JUDICIAL ASSISTANT NORTON: Robert Barnes?

1 MR. BARNES: Here.

2 JUDICIAL ASSISTANT NORTON: Oh.

3 Josh Kobrin? Kobrin, sorry.

4 MR. KOBRIN: I'm here. Thank you.

12:59:13 5 JUDICIAL ASSISTANT NORTON: Thank you.

6 Scott Livingston?

7 I'm going to go down to Rite Aid now.

8 How about John Lavelle?

9 MR. LAVELLE: Yes, I'm here.

12:59:34 10 JUDICIAL ASSISTANT NORTON: Greg Fouts?

11 MR. FOUTS: Yes, here.

12 JUDICIAL ASSISTANT NORTON: I am moving on to
13 Walgreens after I get my highlight function to work. There
14 it is.

12:59:43 15 How about Kaspar Stoffelmayr?

16 MR. STOFFELMAYR: I'm here, Helen.

17 JUDICIAL ASSISTANT NORTON: Thanks.

18 THE COURT: Kate Swift?

19 MS. SWIFT: I'm on. Thank you.

12:59:54 20 JUDICIAL ASSISTANT NORTON: For Walmart, do I
21 have John Majoras?

22 MR. MAJORAS: I'm on.

23 JUDICIAL ASSISTANT NORTON: Tina Tabacchi?

24 MS. TABACCHI: Yes. Thank you.

13:00:07 25 JUDICIAL ASSISTANT NORTON: Tara Fumerton?

1 MS. FUMERTON: Yes. Thank you.

2 MS. YANNI: Hi. It's Cathy.

3 JUDICIAL ASSISTANT NORTON: Hi, Cathy.

4 David -- is David Cohen on yet?

13:00:22 5 SPECIAL MASTER COHEN: I am on. Hi.

6 JUDICIAL ASSISTANT NORTON: Okay. Do I have

7 Scott Livingston for HBC/Giant Eagle?

8 Not yet.

9 I'm going to go back to plaintiffs.

13:00:41 10 Joe Rice, are you on?

11 MR. RICE: Yes, ma'am. I'm on.

12 JUDICIAL ASSISTANT NORTON: Here.

13 Paul Hanly?

14 Paul Farrell?

13:00:54 15 MR. FARRELL: Present and accounted for.

16 JUDICIAL ASSISTANT NORTON: Thank you.

17 Steve Skikos?

18 MR. SKIKOS: Good morning.

19 JUDICIAL ASSISTANT NORTON: Good morning.

13:01:05 20 Troy Rafferty is not going to be on. Okay.

21 MR. RAFFERTY: Actually, I was able to get on.

22 JUDICIAL ASSISTANT NORTON: Oh, great. Then I
23 got you.

24 I know I have counsel for everyone that's on here on
13:01:21 25 my list of expected participants.

1 The only person I've not yet heard from is
2 Scott Livingston.

3 Scott, are you on? Okay.

4 MR. BARNES: Okay. This is Bob Barnes for
13:01:36 5 Giant Eagle.

6 JUDICIAL ASSISTANT NORTON: Okay.

7 MR. BARNES: We can proceed without Scott.

8 JUDICIAL ASSISTANT NORTON: Perfect.

9 I am going to save this. Then I'll email it out
13:01:48 10 later.

11 Okay. I am going to let Judge Polster know in one
12 second that we are on and ready.

13 I am going to remind everyone now that there's a court
14 reporter on the line. Her name is Donnalee Cotone. For
13:02:19 15 Donnalee's sake, please identify yourself every time you
16 speak. Speak slowly and clearly and give her a chance to
17 keep up. If you're not speaking, mute your phone, please.

18 Thank you.

19 Judge is dialing on now.

13:02:56 20 THE COURT: Okay. Dan Polster calling in.

21 JUDICIAL ASSISTANT NORTON: Hi, Judge.

22 On the list of expected participants, everyone is on
23 the line with the exception of Scott Livingston who
24 represents HBC/Giant Eagle.

13:04:20 25 Donnalee is --

1 MR. LIVINGSTON: Actually, I'm on the line.
2 I'm on the line.

3 JUDICIAL ASSISTANT NORTON: Oh, you are.

4 MR. LIVINGSTON: I just came in late, yeah.

13:04:27 5 Sorry.

6 JUDICIAL ASSISTANT NORTON: So you can go
7 ahead, Judge. I'm going to mute this call.

8 THE COURT: All right. Good afternoon,
9 everyone. I hope everyone is staying safe and had a good
13:04:38 10 Thanksgiving.

11 I went over the status report. There were only a
12 couple of things I wanted to cover.

13 First, there's one thing that wasn't on the status
14 report. My recollection is that there's a -- some sort of a
13:04:56 15 jurisdictional motion relative to Rite Aid.

16 There may have -- Rite Aid may have filed a motion to
17 dismiss one of its entities, and there was some discovery.
18 I don't know what's -- what is -- is that still live?

19 Do people care about it, and if so, what is happening?

13:05:19 20 MR. FOUTS: Your Honor, this is Greg Foust on
21 behalf of Rite Aid.

22 That motion is still pending. Your Honor ruled on
23 Rite Aid's objections to Special Master Cohen's order on the
24 scope of jurisdictional discovery. That ruling was, I
13:05:37 25 think, early last month. Discovery is ongoing and has not

1 been completed. I think the parties have been, frankly,
2 very focused on the fact discovery and meeting the deadline.
3 But that --

4 THE COURT: Does anyone really care about --
13:05:51 5 does anyone really care about this?

6 MS. MOORE: Yes, Your Honor.

7 This is Kelly Moore for Rite Aid, and we care about
8 this.

9 THE COURT: All right. Well, fine. I, you
13:05:58 10 know --

11 Well, so when is discovery supposed to be completed on
12 this?

13 MS. MOORE: I -- Your Honor, it depends on
14 the -- it pretty much is -- there's not much left to do
13:06:09 15 based on your recent ruling, so I think it's -- yeah.

16 THE COURT: Are there more briefs that need to
17 be filed? What --

18 MS. MOORE: Well, I think, Your Honor, then
19 the plaintiffs need to file an opposition to our motion to
13:06:24 20 dismiss, and we'll file a reply.

21 THE COURT: All right. Well, again, I don't
22 really even see why it's important. But if it is, I'll get
23 to it. I'll get to it.

24 Okay. Then there is this pending discovery dispute on
13:06:51 25 the October 30th CMO -- the CMO -- the CMO required by

1 October 30th. Each side was to designate persons with
2 relevant knowledge.

3 The plaintiffs designated approximately 100.
4 According to the plaintiffs, the defendants designated
13:07:15 5 something like 75,000. I've read the letters back and
6 forth.

7 Can someone -- what do the defendants think that that
8 provision in the CMO was for?

9 What do you think it was for? And what do you think
13:07:39 10 you accomplished? And what message were you sending by
11 saying there's 75,000 persons with relevant knowledge?

12 MR. DELINSKY: Good afternoon, Your Honor.
13 This is Eric Delinsky on behalf of CVS.

14 THE COURT: Yes, Eric.

13:08:02 15 MR. DELINSKY: Judge, in candor, we weren't
16 focused on the -- you know, what it was for. We don't know
17 what it was for. I think that was a provision that
18 plaintiffs wanted. We were just focused on complying with
19 it.

13:08:19 20 Part of that is that we -- and I think it's
21 self-explanatory. We weren't trying to send a message in
22 any way whatsoever.

23 But we were faced with a real quandary, Your Honor, in
24 that we had this deadline.

13:08:38 25 And were mindful that it's a really big list. I don't

1 want you to think we're suggesting something otherwise,
2 Judge. We're mindful of that.

3 And we by no means believe that this is -- this will
4 be the list that reflects -- a witness list. When the
13:08:58 5 witness list becomes due in spring, we know it will have
6 been to be winnowed down. I just want to let you know that,
7 that we're understanding of that.

8 But when we were put to the test of identifying
9 relevant witnesses, we were just really put in a quandary.
13:09:14 10 And the source of the quandary is plaintiffs' own analysis.
11 Because they've identified 3 million prescriptions that we
12 filled. Between 2.9 million and 3 million prescriptions
13 that we filled that form the foundation of their public
14 nuisance calling.

13:09:41 15 Obviously, Your Honor, any prescriber, doctor, or
16 practitioner who wrote any one of those prescriptions is a
17 person with relevant knowledge. And what we attempted to do
18 was to do what was necessary to, on one hand, comply with
19 the order, and on the other hand, protect ourselves from
13:10:08 20 having witnesses struck from testifying at trial down the
21 road because we didn't identify them.

22 And the fact is, Your Honor, the case continues to be
23 at a very early stage.

24 So we have plaintiffs' red flag analysis. We don't
13:10:30 25 have their expert reports. They haven't examined or deposed

1 any of our witnesses yet. We really don't know but from a
2 statistical analysis how they're going to put these
3 prescriptions to use. We don't know if they're going to
4 narrow the list. We don't know if they're going to, you
13:10:51 5 know, focus on a subset or use precise examples with experts
6 or with our own witnesses. We just don't know.

7 So I can go into more depth on this, Your Honor. But
8 faced with 3 million prescriptions, faced with attempts by
9 plaintiffs in the past to strike trial witnesses because
13:11:12 10 they didn't think we identified them at an early enough
11 juncture, we really just tried to do our best, being at an
12 early stage of the case, to identify people who, in fact, to
13 have relevant knowledge -- I don't think there's any dispute
14 about that -- and to protect ourselves moving forward.

13:11:32 15 Again, we appreciate that as we get closer to trial
16 and actual witness lists are -- those lists are going to be
17 winnowed down considerably. They'll have to be. We get
18 that.

19 THE COURT: Well, everyone knows that.

13:11:45 20 The point -- the point is that --

21 MR. WEINBERGER: Your Honor, can I respond?
22 Perhaps I can --

23 THE COURT: Well, I mean -- I mean, the
24 plaintiffs designated 100 people. All right? It was my
13:11:57 25 CMO, all right, and then with Special Master Cohen. I

1 thought the whole point was to focus the case and give each
2 side a sense of who they might need to depose.

3 I mean, there's a limit -- there's a limited number of
4 depositions, and it makes sense to focus those depositions
13:12:21 5 on people who are likely to be witnesses at the trial.

6 Now, we've already deposed people in Track 1A and
7 Track 1B. They don't have to be redeposed. But new people,
8 that's what everyone is going to focus on. And by
9 designating 75,000 people, you gave plaintiffs no idea or no
13:12:43 10 clue of anything. All right? You said there's 75,000
11 people with relevant knowledge. Well, that may be, but
12 that's meaningless. The plaintiffs didn't do that.

13 So what do you think -- what do you think I should
14 require the defendants to do now?

13:13:04 15 MR. DELINSKY: Your Honor, this is Eric again.

16 The -- my answer to that is nothing, and there's a
17 reason why.

18 We obviously read the CMO differently, and the reason
19 why we did is because there's a provision -- and Judge, I
13:13:22 20 just can't remember off the top of my head whether -- I
21 believe it's in March, maybe March 26th of next year --
22 where we have to provide witness lists. Part of those
23 witness lists is an identification of the 50 most likely
24 trial witnesses. And at that point, plaintiffs have the
13:13:45 25 ability to seek to depose any of those witnesses who have

1 not been deposed to date upon a showing of good cause.

2 So when we read the CMO, we read the identification of
3 likely trial witnesses as something from March, because
4 that's what the CMO said.

13:14:01 5 What we were put upon to respond to here was just
6 identify relevant persons. And in candor, we didn't think
7 we had the right to strike people from our list who we
8 believed had relevant knowledge.

9 THE COURT: Wait a minute. On March 26th,
13:14:21 10 each side has to, you know, designate, you know, winnow it
11 down, 50 people. Again, there's no way you can call
12 anywhere near 50, but it's 50. And then each side has this
13 safe harbor provision. Upon a showing of good cause, they
14 can move to depose any of the 50 who they previously didn't
13:14:42 15 depose. All right?

16 The whole point of that, the good cause would be, you
17 know, they couldn't reasonably have anticipated that that
18 person would be a witness, and that's why they didn't depose
19 them in October, November, December. That would be good
13:15:02 20 cause.

21 Well, what you -- what you've done is, you know,
22 you've completely obviated that. There would be no reason to
23 have that if the prior designations hadn't been designed to
24 give both sides a pretty good sense of who was likely to be
13:15:23 25 a witness.

1 The point is, if someone is on the October 30 list --
2 all right? The plaintiffs had put 100 people on their -- on
3 their list for October 30th. All right? Come March 26th,
4 you know, the plaintiffs' 50, if every single one of them is
13:15:42 5 on that -- you know, from that list, defendants are going to
6 have to make a pretty good showing, good cause why they
7 didn't depose those people. All right?

8 So you've completing obviated that on your side by
9 putting 75,000. Plaintiffs can say, Well, we had no idea
13:16:02 10 what -- the defendants completely hid the ball. We had no
11 clue what they were doing. We guessed. All right. We
12 guessed wrong. Good cause. Let us depose everyone.

13 So I mean, the whole point is --

14 MR. DELINSKY: Judge, we --

13:16:14 15 THE COURT: -- not to have everyone running
16 around doing depositions the two weeks before trial. The
17 trial is May 9th.

18 MR. DELINSKY: Judge, I think I'm hearing you
19 to say that essentially we should have made trial
13:16:29 20 determinations in late October, and we're just not in the
21 position to do that. We can't do that. You know, we've
22 just started depositions. We have no expert reports.
23 Summary judgment hasn't been decided.

24 We are just not in a position six, seven months out
13:16:47 25 from trial to predict who our trial witnesses can be,

1 especially when plaintiffs are -- have identified as the
2 magnitude of their case 3 million prescriptions, which
3 implicates thousands of doctors.

4 We are just not in a position today to predict who our
13:17:09 5 trial witnesses may be with any degree of precision. We're
6 not. It's too early, Judge. I think there's only been
7 roughly 10, 12 depositions so far in the case.

8 THE COURT: Well --

9 MR. WEINBERGER: Your Honor, this is Pete.

13:17:27 10 THE COURT: The plaintiffs were able to come
11 up with 100. The plaintiffs were able to -- I mean,
12 presumably most of their witnesses are going to come -- are
13 going to come from that list of 100. We're also going to
14 have a problem with the Court. If they designate -- you
13:17:42 15 know, come March 26th, if 80 percent of their witnesses were
16 people they didn't, you know -- didn't indicate on
17 October 30th, the defendants are going to go crazy, with
18 some justification.

19 MR. WEINBERGER: Judge --

13:17:58 20 MR. DELINSKY: Your Honor -- Your Honor --

21 (Overlapping speakers.)

22 THE COURT: This is --

23 MR. DELINSKY: Plaintiffs are trying a case
24 that's based on data and statistics. Our case is going to
13:18:11 25 include fact witnesses. And you said from the beginning

1 that, you know, each side within the Rules of Evidence has
2 the leeway to try the cases they see fit, and that means we
3 get to defend it as we see fit.

4 So our approach is very, very different from
13:18:35 5 plaintiffs' approach. And that's okay. That's perfectly
6 appropriate. But that explains, you know, to a large degree
7 the difference between the two lists.

8 MR. WEINBERGER: Your Honor, this is
9 Peter Weinberger. Can I -- can I say something?

13:18:48 10 THE COURT: Yes. Go ahead. Peter.

11 MR. WEINBERGER: Yes. Yes, Your Honor.

12 First of all, to suggest that these seasoned trial
13 lawyers on the other side had no idea what was meant by the
14 provision that they had to identify persons and entities
13:19:05 15 with relevant knowledge on October 30th is, frankly,
16 beyond -- if we were to ask in interrogatory -- this is a
17 standard -- basically an interrogatory in any litigation.
18 This happens to be in the CMO.

19 Everyone who's litigated a case under the federal
13:19:32 20 rules knows that this kind of question allows the other side
21 to understand who are the witnesses that the other side
22 might call, potentially might call, so that they can make a
23 decision as to whether or not to depose them. That's in
24 addition to the people that are identified under the CMO as
13:19:55 25 custodians of the defendants who we might want to depose in

1 order to make out our -- the liability part of our case.

2 The disclosure of persons with knowledge gives us
3 notice of who they potentially might intend to call to
4 support their case. And allows us then to make a decision
13:20:18 5 within the 28 fact witnesses that we're allowed to depose,
6 who are defendants' employees or former employees, we get to
7 make then a decision as to who we need to do discovery
8 depositions on so we know what they're going to say at
9 trial.

13:20:37 10 And we had a discussion about this multiple times
11 before Special Master Cohen when we -- when we discussed a
12 provision like this. And I'm just absolutely dumbfounded
13 that counsel for the -- that Mr. Delinsky can now say he
14 didn't even know -- or they didn't know what this provision
13:21:01 15 meant.

16 MR. DELINSKY: That's not what we're saying.
17 What we're saying is that we --

18 MR. WEINBERGER: Well, wait a minute. Let
19 me --

13:21:07 20 MR. DELINSKY: We believe that --

21 MR. WEINBERGER: Let me finish.

22 MR. DELINSKY: -- what the word --

23 THE COURT: Hold on. Eric, Eric, Eric, Eric,
24 Eric. Come on. Let Peter finish his comment and then I'll
13:21:17 25 let you respond.

1 MR. DELINSKY: Okay. Thank you, Judge.

2 Sorry.

3 MR. WEINBERGER: It was -- and it should have
4 been no surprise to the defendants that how we intended to
13:21:27 5 pursue this case using aggregate data analysis at the time
6 that this CMO was issued.

7 So, you know, this -- that they can attempt to use
8 this March 25 fallback a couple weeks before trial to
9 finally tell us who they might call as part of their
13:21:53 10 case-in-chief so that we can then depose them puts us at a
11 significant disadvantage.

12 The other point in response to this notion that
13 because we have identified all of these problematic
14 prescriptions that were dispensed, that they have the right
13:22:17 15 to just simply list all of the prescribers on those -- who
16 prescribed those prescriptions as persons with knowledge
17 goes squarely contrary to what this Court has said on
18 multiple occasions, and that is that to the extent that the
19 defendants can demonstrate in their documents that they
13:22:43 20 performed due diligence on a flagged prescription before
21 they filled it, information about that due diligence, for
22 example, calls that were made to the doctor about why he
23 issued the prescription that he did, is evidence that is
24 admissible.

13:23:07 25 But the Court has also said on multiple occasions that

1 what the defendants try to demonstrate after the fact by
2 taking the deposition or using the testimony of a doctor who
3 they never contacted on a particular prescription, who they
4 never did due diligence on, is not the issue in this case.

13:23:36 5 That's what the defendants are attempting to do. And,
6 in fact, in the last ten days, they've issued subpoenas
7 daily, multiple times a day, on individual physicians
8 presumably to take depositions of them -- depositions of the
9 Cleveland Clinic physicians, depositions of individual
13:24:02 10 physicians -- with no demonstration whatsoever that they
11 ever contacted these prescribers at the time that the
12 prescription was filled.

13 I mean, that's not the way this case -- or the way
14 that liability is going to be framed in this case.

13:24:22 15 THE COURT: Well, hold it.

16 The plaintiffs can prove their case -- attempt to
17 prove their case any way they want. It's not --

18 I'm not the trial lawyer, Peter. You and your group
19 are. And the defendants can defend it any way they want.

13:24:40 20 If the plaintiffs want to prove their case with
21 statistics and documents, that's fine.

22 And if the defendants want to prove the case by the
23 testimony of a bunch of doctors, they can do it. They can
24 use their whole time. However many hours we've got, they
13:24:59 25 can fill it with doctors. That's okay. And the jury will

1 call it the way the jury calls it.

2 I'm not going to tell the plaintiffs how to prosecute
3 their case, how the defendants how to defend it.

4 And -- but what I'm hearing -- you know, look. I

13:25:15 5 don't have a problem -- the defendants now -- they've
6 indicated they plan to call some physicians. They have made
7 that clear from the beginning. At this point they don't
8 know which ones. Okay. Fine. All right?

9 It's very clear that I would permit -- if come
13:25:33 10 March 26th the defendants identify 20 physicians, and the
11 plaintiffs haven't taken those physicians' depositions, I'll
12 let you do it. All right? There's no way you could guess
13 which of thousands of physicians the plaintiffs -- the
14 defendants might call. So fine. I'm not concerned about
13:25:53 15 that because you can always depose them at the end.

16 I'm more concerned about the defendants' designating
17 their current and former employees who their -- and that
18 they ought to know. They ought to have a pretty good idea
19 now. Okay? And they don't have to hide the ball on that.

13:26:15 20 So I think that's where we need to focus on this. I
21 don't really care about that there are thousands and
22 thousands of potential physicians out there. The defendants
23 will call a few. And I don't think the plaintiffs need to
24 know those now.

13:26:32 25 But they do need to have a sense of who the current

1 and former defendant employees the defendants are seriously
2 thinking about calling as witnesses because those are the
3 folks they want to depose.

4 So -- and I don't think the defendants have narrowed
13:26:50 5 that down in any meaningful way.

6 Am I right?

7 MR. WEINBERGER: That's correct.

8 THE COURT: Well, that --

9 MR. DELINSKY: Judge, I --

13:26:58 10 THE COURT: That needs to get done.

11 MR. DELINSKY: Judge -- Judge, I don't -- I
12 don't think it's fair to say that that's correct. We have
13 it winnowed it down. Okay?

14 THE COURT: Well, how many -- well, how
13:27:11 15 many -- how many -- how many current and former defendant
16 corporate employees are on that October 30th list?

17 MR. DELINSKY: Well, I can speak -- in terms
18 of specifics, Judge, I can speak --

19 THE COURT: Let's start with CVS. All right,
13:27:25 20 Eric?

21 MR. DELINSKY: Okay.

22 THE COURT: Just go with CVS.

23 MR. DELINSKY: Yes. I believe we have -- and
24 if I can break it down, Judge. I believe we've identified
13:27:35 25 by name 100 -- I'm trying to do the math here -- 107,

1 Your Honor.

2 That includes -- and just so you understand who that
3 includes. More than half of those are negotiated
4 custodians, many of whom were custodians way back in Track
13:27:56 5 1, because as you'll recall, Your Honor, this includes not
6 only the dispensing side of the case, but also the
7 distribution side of the case.

8 So it involves all the people who have already been
9 subject to discovery and document production, and then it
13:28:10 10 also includes new people that we've negotiated with
11 plaintiffs who, you know, are custodians for document
12 production purposes.

13 And then, you know, slightly less than half of that
14 number are pharmacists and other people who worked in the
13:28:25 15 field in Lake and Trumble counties.

16 So, Judge, just to frame that out, you know, we --
17 depending on the time frame -- operated as many as 15
18 individual pharmacies in those two counties combined. I
19 think it's 14 today. I may be off. And plaintiffs, of
13:28:45 20 course, have established a discovery period going back 14
21 years.

22 THE COURT: Yeah.

23 MR. DELINSKY: So that -- you know, the 50
24 pharmacies -- pharmacists and supervisors from 15 different
13:28:56 25 pharmacies over 14 years, that's -- that's pretty tight,

1 Your Honor. That's a winnowed number.

2 MR. WEINBERGER: Well, Judge, if -- to answer
3 your question directly, if you look -- starting on page 4 of
4 our letter to Special Master Cohen, dated November 23rd, you
13:29:20 5 will see that we have broken down for CVS and the other
6 defendants what it is that -- how they've described and who
7 they've actually named as individual people with knowledge.

8 Some -- so for CVS, we have 100 CVS personnel, no
9 titles provided, plus --

13:29:48 10 MR. DELINSKY: We did provide titles in
11 interrogatory response.

12 MR. WEINBERGER: Plus --

13 For all 100?

14 MR. DELINSKY: I believe so, Pete.

13:29:58 15 MR. WEINBERGER: -- plus categories of unnamed
16 individuals.

17 MR. DELINSKY: Yeah, but as we said in our --
18 in our briefing on this, we identified all the names that we
19 knew and that we knew at this time who we might ever use at
13:30:16 20 trial. The categories were an abundance of caution. Those
21 categories have been used all the way back to Track 1A.
22 There's never been a complaint to now. We didn't use those
23 as a substitute for identifying names.

24 If we had a name, we identified it, based on the
13:30:34 25 knowledge we had today.

1 THE COURT: Well, look. All right. So let's
2 just stick with CVS. I mean, I -- all right? CVS
3 is -- they've listed 107 present and former corporate
4 employees.

13:30:57 5 Pete, they're saying half are document custodians. We
6 know all those people, and they're really not germane for
7 depositions.

8 The other half are their pharmacies. All right? They
9 have roughly 50 pharmacists over a 14-year period, that
13:31:15 10 there are 14 or 15 pharmacies.

11 All right? At this point they don't know which of
12 them they're going to call. They'll probably -- they'll
13 certainly call some. All right? Now, my guess -- my guess,
14 Eric, though, is that you got -- out of those 50
13:31:35 15 pharmacists, you've got -- you've got some sense of who
16 you're likely to call. And there's no reason you can't
17 designate -- you know, identify those now. If the
18 plaintiffs want to use some of their depositions on the
19 pharmacists, they can.

13:31:55 20 Otherwise, we'll wait until March 26th, and I'll let
21 them depose any pharmacist you call, because there's no way
22 they would be able to guess out of 50 which one to depose
23 now, so I'll let them depose them in March and April. I
24 mean, if you want it -- I mean --

13:32:17 25 MR. DELINSKY: Yeah. Yeah, the --

1 MR. WEINBERGER: Your Honor --

2 MR. DELINSKY: -- problem --

3 MR. WEINBERGER: Your Honor, that sort of

4 back-end approach -- which I understand is basically a

13:32:25 5 savings clause for us -- really puts us at a disadvantage in

6 terms of doing the discovery in the case.

7 I mean, I don't really understand the, you know--

8 MR. DELINSKY: Judge --

9 MR. WEINBERGER: -- the --

13:32:45 10 MR. DELINSKY: -- the one --

11 Judge, the one thing I would add, Judge, is all these

12 pharmacists were identified in our data, which we produced

13 now many, many months ago.

14 So plaintiffs, going back now -- Pete may know the

13:33:02 15 date better than me -- maybe June, maybe July, had access to

16 all our data --

17 THE COURT: Well, there's no --

18 MR. DELINSKY: -- after the --

19 THE COURT: There's no question, these

13:33:10 20 aren't -- these aren't, you know, clandestine people. I

21 mean, everyone knows who --

22 MR. DELINSKY: Right. Exactly, Judge. Yeah,

23 exactly.

24 THE COURT: That isn't the issue, Eric, that

13:33:19 25 they're -- that they're clandestine and their identities

1 aren't known.

2 They know who their pharmacists were. They know who
3 their -- you know, Walmart pharmacists are. I mean, heck.
4 It's public knowledge. You can find out -- walk in and see
13:33:34 5 who the pharmacist is.

6 But it's -- the point -- the point is, the way you've
7 handled this, the plaintiffs are going to have really no
8 idea who any of your witnesses are, any of them, until March
9 the 26th. And then you're each going to designate 50
13:33:56 10 people. So that's five defendants times 50.

11 They'll be 250 people designated. And the plaintiffs
12 will be able to say credibly that they, you know, had no
13 good reason to be able to depose any of those. So they're
14 going to have to run around and, you know, I'll let them
13:34:18 15 take 250 depositions in the few weeks before trial?

16 That's --

17 MR. WEINBERGER: Actually, Your Honor --

18 THE COURT: That's a crazy way --

19 MR. WEINBERGER: Your Honor --

13:34:27 20 THE COURT: -- to run this case.

21 MR. WEINBERGER: Your Honor, your CMO -- your
22 CMO actually allows the defendants jointly to identify no
23 more than 50 fact witnesses.

24 THE COURT: All right. Well, fine.

13:34:41 25 All right. How many do the plaintiffs name?

1 MR. WEINBERGER: And --

2 THE COURT: Fine. So they'll have 50. So
3 even though -- they'll have to take 50 -- they'll literally
4 have to take 50 depositions, and you'll have to be there to
13:34:58 5 defend them in the couple of weeks before trial.

6 Now, think about that. That's a crazy way to do this
7 case. But that's what -- that's where we're headed if I
8 don't do something.

9 MR. DELINSKY: Your Honor --

13:35:14 10 MR. WEINBERGER: Well, it's not just that,
11 Your Honor. It's not just that, Your Honor. It's the fact
12 that we have -- we're not able to prepare, and, for example,
13 provide testimony from these potential witnesses to our
14 experts.

13:35:30 15 MR. DELINSKY: Your Honor --

16 (Overlapping speakers.)

17 MR. DELINSKY: I'm sorry, Pete.

18 THE COURT: Well, all right. That's
19 another -- that's another concern. They can't, you
13:35:42 20 know -- it will be way too late to do -- start having all
21 new expert reports.

22 MR. WEINBERGER: Your Honor --

23 THE COURT: You'll have essentially trial by
24 ambush, and we don't do that in our country. So I --

13:35:55 25 MR. DELINSKY: But, Your Honor, the origin of

1 the problem here -- this is not trial by ambush. Okay?

2 And the origin of the problem is Plaintiffs 3 million
3 prescriptions. That is a theory of staggering magnitude.

4 And, frankly, when plaintiffs identify 3 million

13:36:20 5 prescriptions, and each of us identify, you know, 50

6 pharmacists, that's an extremely moderate number in the face
7 of 3 million prescriptions.

8 The table setter here is what plaintiffs have done,
9 and we're trying our best to respond.

13:36:43 10 And in candor, Your Honor -- and I know you don't want
11 to hear it, and now is probably not the place to litigate
12 this. But in candor, we object to the 50-person -- the
13 50-witness limit. We object to the four-week trial. We
14 don't believe that that's adequate for us to defend against
13:37:05 15 3 million prescriptions.

16 If we had our druthers, we would have the time to call
17 much closer to 50 pharmacists. You said we can't. We don't
18 have that time.

19 But to call on us to begin to winnow down a list --
13:37:21 20 that's already winnowed -- when plaintiffs have all the data
21 on each of these pharmacists so they can make informed
22 decisions on who they may wish to depose, when we don't even
23 have their expert reports, we don't even know what they're
24 going to focus on, other than a red-flag analysis that
13:37:40 25 identifies by category 3 million scripts, that's really

1 difficult, Judge.

2 And it's just -- I understand the problem. I don't
3 want you to think I'm insensitive to the problem. I'm
4 practical minded and see it. But we're struggling, too.

13:37:57 5 This is not a problem of our creation. It's -- we are
6 really struggling with 3 million scripts, not having expert
7 reports, not knowing how plaintiffs are going to manifest
8 this evidence, not knowing are plaintiffs going to focus on
9 this store or that store or this period of time or that,
13:38:20 10 that can influence which of the 50 pharmacists we may focus
11 on. We don't know. We're groping in the dark, too. And
12 all that groping is a creation of the 3 million scripts.
13 It's hard, Judge.

14 And I see the practical components of it. But we have
13:38:41 15 practical problems, too, and they are extremely difficult.
16 And we're doing our very best, our level best, to navigate
17 through them.

18 MR. WEINBERGER: Your Honor, I don't know
19 where to start.

13:38:58 20 THE COURT: Well, I have to -- I have a
21 suggestion.

22 I mean, if the plaintiffs now have a -- if the
23 plaintiffs have identified particular pharmacists,
24 pharmacies, stores, all right, that they believe are -- was
13:39:15 25 a real problem, they ought to identify them now, and say,

1 you know, this level of all statistical analysis, here are
2 pharmacies.

3 MR. WEINBERGER: Your Honor --

4 THE COURT: I --

13:39:28 5 MR. WEINBERGER: Your Honor --

6 Your Honor -- can I -- I have to jump in. I'm sorry.

7 THE COURT: All right.

8 MR. WEINBERGER: I have to respond to that,
9 and I have to respond to Mr. Delinsky.

13:39:38 10 You know, the fact is that these retail pharmacies,
11 they make their living off of their own data. They have
12 full and complete visibility from the distribution side down
13 to the dispensing side of what is going on in every single
14 one of their pharmacies.

13:39:57 15 I mean, that's what this case is about. It's about
16 their --

17 MR. DELINSKY: You have that, too, Pete.

18 MR. WEINBERGER: -- visibility.

19 MR. DELINSKY: You have that too, now. You
13:40:05 20 have the exact same visibility now that we do. You have
21 everything.

22 MR. WEINBERGER: Can you let me finish?

23 MR. DELINSKY: The data --

24 MR. WEINBERGER: Can you -- can you let me
13:40:12 25 finish? You know, I didn't interrupt you.

1 THE COURT: I'm going to end this very soon
2 because it's just a waste of time. All right?

3 MR. WEINBERGER: Well, Your Honor --
4 Your Honor -- Your Honor, it's not -- it's not a waste of
13:40:25 5 time because what this story that they're -- that they're
6 giving you about how this is such a complex case because we
7 based it upon the identification of prescriptions from data
8 is a fallacy. It is data that they know everything there is
9 to know about -- or should have -- from the distribution to
13:40:51 10 the dispensing level.

11 So they -- they are in the best position having gotten
12 our red flags early in the case, our red flags that we're
13 going to analyze early in the case, which is what you and
14 Special Master Cohen ordered us to do before any expert
13:41:10 15 reports.

16 They can look at that data and say, Whoa. So these
17 are the pharmacies in these very small counties. We're not
18 talking about hundreds of pharmacies. Okay? We're talking
19 about small counties with a limited number of pharmacies.
13:41:29 20 They know exactly what their data shows.

21 THE COURT: That's true.

22 MR. WEINBERGER: They know exactly how the --

23 THE COURT: They can see the number of red
24 flags per pharmacy.

13:41:35 25 So, Eric, you can see, out of your 14 or 15

1 pharmacies -- I mean, you can see -- if there are a few of
2 them that have a whole lot of red flags, you know that the
3 plaintiffs are going to zero in on that. All right?

4 If you --

13:41:53 5 MR. WEINBERGER: And, Your Honor -- and, Your
6 Honor, the fact of the matter is is that apparently they've
7 done that analysis because they've selected out a number of
8 physicians who they want to depose. I think they -- I think
9 the number is probably between 30 and 50 they've already
13:42:09 10 identified and noticed for deposition.

11 So to suggest that they can't figure out where we're
12 going on the case and determine which pharmacists need to
13 be -- that they intend to call so that we can depose them is
14 just -- it's just a complete fallacy, Your Honor. It's a
13:42:27 15 red herring that is trying to put the burden on us, when, in
16 fact, the burden should be on these defendants to narrow
17 down their list of witnesses now so that we can have an
18 opportunity to make a decision as to whether or not to
19 depose them.

13:42:45 20 MR. DELINSKY: Your Honor, I'd like to
21 respond, but I have a hunch you're getting upset with us.

22 THE COURT: Well, this is --

23 MR. DELINSKY: So if you don't want to
24 hear --

13:42:53 25 THE COURT: Well, this is going nowhere.

1 You know, we're going to try this case. And I
2 don't -- you know, and it's going to be roughly one month.
3 I mean, the defendants want years to try the case. It isn't
4 going to happen. All right? If you don't want -- you know,
13:43:05 5 if you want to try and counter their statistics by calling a
6 bunch of physicians and pharmacists, that's okay.

7 But the focus is going to be on where the -- you know,
8 where the problem was, and the plaintiffs will identify
9 where the problem was, and you can -- you know that from the
13:43:22 10 red flag analysis. You can see, you know, if there are
11 particular pharmacists in particular years that have a big
12 problem. There it is. Well, you're going to have to -- I
13 mean, of course, the plaintiffs will know that, too, and
14 they can call those people, but --

13:43:39 15 All right. Look. I'm just going to have to figure
16 out -- I'm going to have to do something. All right? I
17 can't -- I can't leave it the way it is.

18 Unless the defendants have -- unless the defendants
19 collectively have a suggestion as to how they're going to
13:43:55 20 very quickly amend their response, I will just -- I'll give
21 it some thought. I'll talk to my group, and I'll just order
22 something. If the defendants have a suggestion as to what
23 they think they should do, if they do, I'd like to hear it
24 now.

13:44:10 25 MR. DELINSKY: Yeah.

1 Your Honor, I don't think we can amend the response
2 because that could lead to a situation down the road where
3 plaintiffs, depending on --

4 THE COURT: I will just know to do
13:44:20 5 something --

6 MR. DELINSKY: No --

7 THE COURT: -- and that will be that. So you
8 don't have to do it yourself. I'm open to suggestions.

9 MR. DELINSKY: No. No, Your Honor. If I
13:44:25 10 could -- if I could just finish. If I could just finish,
11 Your Honor, because that was just sort of a predatory
12 clause.

13 We are worried about learning things in February and
14 expert reports and moving forward, then realizing we need
13:44:40 15 witnesses, and we can't have a situation where they haven't
16 been identified or they've been withdrawn and so we can't
17 use them.

18 But what I would recommend is let the -- based on the
19 conversation, if the defendants could have an opportunity to
13:44:57 20 discuss this matter amongst themselves and determine if
21 there's a proposal to be made.

22 THE COURT: Well, I'll give you a very short
23 window to do that, Eric. I would rather, you know, let me
24 see what you're suggesting based on this conversation. But
13:45:19 25 I'm going to have to do something, because the way it is now

1 is unfair, unmanageable, unworkable. So you've got
2 to -- all right. Now is -- all right. It's Wednesday
3 afternoon.

4 Well, how much time do you want? And I'll see if I
13:45:53 5 can give you that much.

6 What are you suggesting?

7 MR. DELINSKY: 48 hours, Your Honor.

8 THE COURT: All right. I think that's
9 reasonable. I'll just say, you know, we'll make it
13:46:10 10 3:00 -- 3:00 p.m., Friday, for defendants' proposal.

11 So why don't you send it -- send it to me, Special
12 Master Cohen, and the plaintiffs, and then I think I'd like
13 to have the plaintiffs' response to the defendants'
14 proposal. And then I'll make the decision as to what I'm
13:46:42 15 going to do.

16 So Peter, if you get the -- if you get the defendants'
17 proposal 3:00 p.m., Friday, when do you want to get your
18 response in?

19 MR. WEINBERGER: All right. Give us until
13:46:54 20 Monday at 3:00 p.m.

21 THE COURT: That's fair. Okay. That's Monday
22 the 7th, at 3:00 p.m., and then I'll get to it promptly.

23 Again, I want -- you know, this isn't a football game
24 or a fencing game.

13:47:17 25 Everyone has an interest in having this trial be

1 orderly. Okay? I have no idea what a jury is going to do,
2 but I want -- I want this trial to be orderly.

3 Plaintiffs can present their case any way they want.
4 The defendants can present their defense any way they want.
13:47:39 5 It will be a totally different defense. That's fine.

6 But the way we're headed is going to be complete
7 chaos, and that's not way I do things. All right? I want
8 to have a good sense of what this trial is going to be
9 about, and each side should have a good sense when they go
13:47:58 10 in what the trial is going to be about, and both sides will
11 be prepared.

12 So we've got the best lawyers in the country, and all
13 of you have done complex cases and trials. So you know how
14 to do them. And we're just headed toward chaos here, and
13:48:17 15 we're not going to have that.

16 So I'll -- hopefully over the next few days you can
17 come up with something, some suggestions as to what we do.
18 And I'd rather listen and react to your proposals rather
19 than just coming up with something myself.

13:48:37 20 All right. Have the parties been meeting individually
21 or jointly with Judge Gandhi?

22 MS. TABACCHI: Your Honor, it's Tina Tabacchi
23 from Jones Day.

24 Individual pharmacy defendants continue to communicate
13:49:04 25 and meet with Judge Gandhi and the plaintiffs said there

1 were some meetings, you know, earlier this week.

2 THE COURT: Okay. All right. Well, that's
3 good, because, you know --

4 MR. RICE: Judge, this is Joe.

13:49:23 5 I don't think -- I don't -- I can't agree totally with
6 the report that you were just given. There were -- there
7 are some pharmacies that are continuing in discussion, but
8 there are some that are not.

9 THE COURT: All right. Well, that's okay
13:49:43 10 because, you know, each defendant is a separate entity and
11 they can -- they don't have to take the same position.

12 MR. RICE: Understand.

13 THE COURT: So that's fine. So some are
14 meeting, some are not. That's fine.

13:49:58 15 All right. This is all I'm going to say on this.
16 There are approximately ten state Attorney's General who
17 have sued one or more of the pharmacy defendants in
18 their -- in state court in their respective state. I think
19 it's about ten.

13:50:24 20 I cannot imagine any defendant wanting to settle cases
21 with the subdivisions without settling with the states. All
22 right? It just doesn't make sense.

23 I've asked before -- and it's my understanding that no
24 one has yet involved any of the AGs in these discussions
13:50:51 25 with Judge Gandhi.

1 I am the one person who speaks directly to Attorney's
2 General. I have been doing this regularly from the
3 beginning of this MDL. I speak with -- I've spoken to more
4 than ten of them personally. I speak to them frequently.

13:51:21 5 And I think if the parties -- any defendants who are
6 serious about resolving their case, I can't imagine would
7 not want to involve the states, and I don't see how you're
8 going to do that without utilizing my involvement. Maybe
9 Judge Gandhi can do that, but I don't think you can pick up
13:51:42 10 the phone and call an Attorney General. I can. I do it all
11 the time. And if they're not available, they get back to me
12 within 24 hours.

13 So I think any pharmacy that is serious about
14 exploring resolution needs to think about that and figure
13:52:04 15 out what you're going to do. I know the pharmacies have
16 said they don't want me involved in settlement, so I have
17 not had any discussions with anyone about resolving the case
18 against -- the cases against any pharmacy.

19 But I can't see how you're going to get any resolution
13:52:27 20 without involving the states, and I don't know how you do
21 that without me.

22 So I think over the next month -- because candidly,
23 there's -- I mean, there's been a lot in the paper about a
24 proposed resolution with the big three distributors and
13:52:49 25 Johnson & Johnson that involves all the subdivisions and the

1 states. And a whole a lot work is going on right now about
2 that. And I think all the AGs are focussed on that and
3 getting that done. But when and if that's concluded, I
4 think they'll want to focus on these -- on the remaining
13:53:10 5 defendants, and the remaining defendants include a handful
6 of manufacturers and the pharmacies.

7 So I suggest the pharmacies think about that over the
8 next few weeks, and it will probably be a good time to
9 discuss that in January.

13:53:28 10 So the only other thing I had on my list was to set a
11 time for next month. And we've been meeting on Wednesday
12 toward the beginning of the month. I suggest we not meet
13 the first Wednesday because that's so close to New Year's,
14 but we do it the second Wednesday of January, which would be
13:53:53 15 the 13th. And because I may -- there's a possibility I'll
16 be in trial, I'm suggesting we do it at noon on Wednesday
17 the 13th.

18 Does anyone have a strong problem with noon on
19 Wednesday, January 13th? And then I'd have the joint status
13:54:24 20 report noon the proceeding day, which would mean 12th.

21 MR. WEINBERGER: It should be fine for the
22 plaintiffs, Your Honor.

23 THE COURT: Okay.

24 MR. DELINSKY: I'll make it work, Your Honor,
13:54:44 25 for the defendants.

1 THE COURT: I think it's better to meet in the
2 middle, not have it immediately after New Year's.

3 All right. There wasn't anything -- any other action
4 item that I saw from the status report or anything else.

13:55:03 5 But I -- if there's something that anyone, either side,
6 wants to bring up, now would be the time.

7 MR. FARRELL: Judge, this is Paul Farrell, and
8 I wanted to provide a quick update.

9 The West Virginia CT2 case is set for trial January 4
13:55:24 10 in West Virginia, and there's a pending motion to continue
11 it with regard to the COVID epidemic.

12 THE COURT: All right.

13 MR. FARRELL: I think if I were a betting man,
14 I would probably wager heavily on a continuance.

13:55:43 15 THE COURT: Yeah. I would too, Paul. I would
16 too, Paul. I mean, our Court -- we had a couple of criminal
17 trials scheduled for next week, and we're not having them.
18 And our Court is meeting on Monday morning.

19 The way it works, we decide, you know, like two months
13:55:59 20 in advance. So we'll be deciding what, if any, trials we
21 have in January or February and what, if any, restrictions.

22 So, obviously, the numbers are bad in Ohio. They're
23 pretty bad everywhere, in the whole country.

24 So there's a big article in today's New York Times
13:56:17 25 about the difficulty New York is having with trials.

1 So, yeah. I would expect that would be postponed, but
2 it's up to that judge or that court.

3 Okay. You know, I don't -- and I know Judge Garguilo
4 was, you know, planning to go forward, or has been planning
13:56:39 5 to go forward. That's in the status report. But, you know,
6 I don't know when -- when he's supposed to be deciding when
7 he's -- if he's going to go forward or not.

8 MR. SHKOLNIK: Judge Polster, this is
9 Hunter Shkolnik.

13:56:54 10 New York has a stay of all trials right now. So we
11 don't know -- and I guess we're going to be having a status
12 conference with Judge Garguilo in the coming weeks.

13 THE COURT: Yeah. Well, you know, no one is
14 going to have a trial if they don't think they can do it
13:57:14 15 safely and fairly. So --

16 Okay. Anything else anyone wanted to raise?

17 All right. Hearing nothing, I hope everyone has a
18 good holiday and stays safe. And we'll talk to everyone in
19 January.

13:57:31 20 Thank you. We're adjourned.

21 PARTICIPANTS EN MASSE: Thank you, Your Honor.

22 - - -

23 (Proceedings adjourned at 1:57 p.m.)

24

25

C E R T I F I C A T E

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

/s/ Donnalee Cotone 3rd of December, 2020
DONNALEE COTONE, RMR, CRR, CRC DATE
Realtime Systems Administrator